NOVEMBER 2002

MJI Publications Updates

Crime Victim Rights Manual

Domestic Violence Benchbook, 2d Edition

Friend of the Court Domestic Violence Resource Book

Managing a Trial Under the Controlled Substances Act

Sexual Assault Benchbook

November 2002

Update: Crime Victim Rights Manual

CHAPTER 4

Protection From Revictimization

4.12 Criminal Offenses That May Be Committed While Threatening or Intimidating a Victim

D. Malicious Use of the Telephone

Effective November 1, 2002, 2002 PA 577 amended numerous provisions of MCL 750.540e, including the maximum authorized fine. Accordingly, the quoted language in subsection 4.12(D) should be replaced as follows:

> "(1) A person is guilty of a misdemeanor who maliciously uses any service provided by a telecommunications service provider with intent to terrorize, frighten, intimidate, threaten, harass, molest, or annoy another person, or to disturb the peace and quiet of another person by any of the following:
>
> > "(a) Threatening physical harm or damage to any person or property in the course of a conversation or message through the use of a telecommunications service or device.
> >
> > * * *
> >
> > "(e) Repeatedly initiating a telephone call and, without speaking, deliberately hanging up or breaking the telephone connection as or after the telephone call is answered.
>
> * * *
>
> "(2) A person violating this section may be imprisoned for not more than 6 months or fined not more than $1,000.00, or both. An offense is committed under this section if the communication terminates in this state and may be prosecuted at the place of origination or termination."

CHAPTER 8

The Crime Victim at Trial

8.9 Evidence of the Victim's Character

B. Criminal Sexual Conduct Cases

5. Cases Addressing the Defendant's Rights to Confrontation and to Present a Defense

Insert the following case summary at the end of Section 8.9(B)(5), after the summary of the *Powell* case:

> In *Lewis v Wilkinson*, ___ F3d ___ (CA 6, 2002), a federal habeas corpus case, the defendant was convicted by a jury of rape in the Ohio Court of Common Pleas after he sexually penetrated the victim in her dorm room at the University of Akron. The defendant and victim were friends who met during their first year of college. The defense at trial was consent. At issue on appeal was the trial judge's refusal to admit into evidence specific portions of the victim's diary under Ohio's rape shield statute, which is substantially similar to Michigan's rape shield statute under MCL 750.520j. The diary entry at issue during the trial and on appeal was as follows (the excluded statement is italicized):
>
> > "I can't believe the trial's only a week away. I feel guilty (sort of) for trying to get Nate [the defendant] locked up, but his lack of respect for women is terrible. I remember how disrespectful he always was to all of us girls in the courtyard . . . he thinks females are a bunch of sex objects! And he's such a player! He was trying to get with Holly and me, and all the while he had a girlfriend. I think I pounced on Nate because he was the last straw. That, and because I've always seemed to need some drama in my life. Otherwise I get bored. That definitely needs to change. I'm sick of men taking advantage of me . . . *and I'm sick of myself for giving in to them. I'm not a nympho like all those guys think. I'm just not strong enough to say no to them. I'm tired of being a whore. This is where it ends*. *Id.* at ___. [Emphasis added.]
>
> The defendant claimed that the trial judge's failure to admit the italicized statements amounted to a denial of his Sixth Amendment right to confront the witness. The Ohio Court of Appeals affirmed defendant's conviction. The Ohio Supreme Court denied leave to appeal, dismissing the appeal as not involving any substantive constitutional question, even though the Supreme Court was

presented with defendant's Sixth Amendment issue. The United States District Court for the Northern District of Ohio denied defendant's petition for habeas corpus. The U.S. Court of Appeals for the Sixth Circuit reversed the District Court's denial of habeas relief, remanding with directions to issue a conditional writ of habeas corpus. The Sixth Circuit Court of Appeals held that the trial court violated defendant's Sixth Amendment right to confront witnesses when it refused to admit the foregoing italicized statements, finding that the judge could have reduced the prejudicial effect of such evidence by limiting the scope of cross-examination as to the victim's prior sexual activity and reputation:

> "[Defendant] was denied his Sixth Amendment right to confrontation when the trial court excluded several statements from the alleged victim's diary. The statements at issue, especially when read with the diary entry in its entirety, can reasonably be said to form a particularized attack on the witness's credibility directed toward revealing possible ulterior motives, as well as implying her consent. This court recognizes the difficulty a trial judge faces in making an evidentiary decision with the urgency that surrounds the wrapping up of pretrial loose ends prior to the start of jury selection. The trial court took the state's interests in protecting rape victims into account in excluding the statement, but did not adequately consider the defendant's constitutional right to confrontation. The jury should have been given the opportunity to hear the excluded diary statements and some cross examination [sic], from which they could have inferred, if they chose, that the alleged victim consented to have sex with the [defendant] and/or that the alleged victim pursued charges against the [defendant] as a way of getting back at other men who previously took advantage of her. The trial court can reduce the prejudicial effect of such evidence by limiting the scope of cross-examination as to the victim's prior sexual activity and her reputation." *Id*. at ___.

CHAPTER 12

The Relationship Between Criminal or Juvenile Proceedings & Civil Actions Filed by Crime Victims

12.2 Statute of Limitations for Tort Actions

Insert the following language at the end of the first full paragraph on p 298:

> See also *Hoekstra v Bose*, ___ Mich App ___ (2002), where the Court of Appeals held that under MCL 600.5856 the limitations period is tolled upon the proper filing and service of a complaint and summons, even though the court may not have acquired personal jurisdiction over the defendant.

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Update: Domestic Violence Benchbook (2d ed)

CHAPTER 3

Common "Domestic Violence Crimes"

3.13 Other Crimes Commonly Associated with Domestic Violence

A. Offenses Against Persons

10. Malicious Use of Mail or Telecommunications Services

- Effective November 1, 2002, 2002 PA 577 amended MCL 750.540e to provide that it is a misdemeanor punishable by six months in jail and/or a $1,000 fine to use "any service provided by a telecommunications service provider with intent to terrorize, frighten, intimidate, threaten, harass, molest, or annoy another person, or to disturb the peace and quite of another person."

CHAPTER 5

Evidence in Criminal Domestic Violence Cases

5.8 Expert Testimony on Battering and Its Effects

B. Michigan Cases Addressing Evidence of Battering and Its Effects

Insert the text below following the discussion of *People v Wilson*, 194 Mich App 599 (1992) on p 164:

F *People v Kurr*, ___ Mich App___ (2002) (defendant seeks to prove that she committed murder in defense of her unborn children):

The defendant was convicted of voluntary manslaughter for the stabbing death of her boyfriend. The defendant claimed that her boyfriend had punched her twice in the stomach, and that she then warned him not to hit her because she was carrying his babies. When her boyfriend came at her again, she stabbed him in the chest, killing him. At trial, the defendant asserted the "defense of others" defense and requested the jury instruction CJI2d 7.21, which provides in part, "a person has the right to use force or even take a life to defend someone else under certain circumstances." The trial court denied that request, indicating the testimony showed the fetuses were only at 16 or 17 weeks of gestation and would not be viable. Accordingly, the court found the "defense of others" jury instruction was not appropriate because the fetuses had to be living human beings existing independent of the defendant. *Id.* at ___. The Court of Appeals reversed the trial court and provided that the "defense of others" instruction does apply to the defense of a fetus from an assault against the mother, regardless of whether the fetus is viable. *Id.* at ___. The Court of Appeals concluded that the Legislature had determined that fetuses and embryos were worthy of protection, as evidenced by the Fetal Protection Act, MCL 750.90a et seq. The Court of Appeals indicated:

> "Because the act reflects a public policy to protect even an embryo from unlawful assaultive or negligent conduct, we conclude that the defense of others concept does extend to the protection of a nonviable fetus from an assault against the mother. We emphasize, however, that the defense is available *solely* in the context of an assault against the mother." *Id. at* ___. [Emphasis in original.]

The Court of Appeals remanded the case for a new trial, indicating the failure of the trial court to instruct the jury on the "defense of others" theory deprived the defendant of her due process right to present a defense. *Id*. at ___.

CHAPTER 5

Evidence in Criminal Domestic Violence Cases

5.11 Rape Shield Provisions

B. Illustrative Cases

1. Nature of Admissible Evidence

Insert the following case summary as the last bullet in Section 5.11(B)(1), after the summary of the *Mikula* case:

F *Lewis v Wilkinson*, ___ F3d ___ (CA 6, 2002):

In this federal habeas corpus case, a jury in the Ohio Court of Common Pleas convicted the defendant of rape after he sexually penetrated the victim in her dorm room at the University of Akron. The defendant and victim were friends who met during their first year of college. The defense at trial was consent. At issue on appeal was the trial judge's refusal to admit into evidence specific portions of the victim's diary under Ohio's rape shield statute, which is substantially similar to Michigan's rape shield statute under MCL 750.520j. The diary entry at issue during the trial and on appeal was as follows (the excluded statement is italicized):

> "I can't believe the trial's only a week away. I feel guilty (sort of) for trying to get Nate [the defendant] locked up, but his lack of respect for women is terrible. I remember how disrespectful he always was to all of us girls in the courtyard . . . he thinks females are a bunch of sex objects! And he's such a player! He was trying to get with Holly and me, and all the while he had a girlfriend. I think I pounced on Nate because he was the last straw. That, and because I've always seemed to need some drama in my life. Otherwise I get bored. That definitely needs to change. I'm sick of men taking advantage of me . . . *and I'm sick of myself for giving in to them. I'm not a nympho like all those guys think. I'm just not strong enough to say no to them. I'm tired of being a whore. This is where it ends*. *Id*. at ___. [Emphasis added.]

The defendant claimed that the trial judge's failure to admit the italicized statements amounted to a denial of his Sixth Amendment right to confront the witness. The Ohio Court of Appeals affirmed defendant's conviction. The Ohio Supreme Court denied leave to appeal, dismissing the appeal as not involving any substantive constitutional question, even though the Supreme Court was

presented with defendant's Sixth Amendment issue. The United States District Court for the Northern District of Ohio denied defendant's petition for habeas corpus. The U.S. Court of Appeals for the Sixth Circuit reversed the District Court's denial of habeas relief, remanding with directions to issue a conditional writ of habeas corpus. The Sixth Circuit Court of Appeals held that the trial court violated defendant's Sixth Amendment right to confront witnesses when it refused to admit the foregoing italicized statements, finding that the judge could have reduced the prejudicial effect of such evidence by limiting the scope of cross-examination as to the victim's prior sexual activity and reputation:

> "[Defendant] was denied his Sixth Amendment right to confrontation when the trial court excluded several statements from the alleged victim's diary. The statements at issue, especially when read with the diary entry in its entirety, can reasonably be said to form a particularized attack on the witness's credibility directed toward revealing possible ulterior motives, as well as implying her consent. This court recognizes the difficulty a trial judge faces in making an evidentiary decision with the urgency that surrounds the wrapping up of pretrial loose ends prior to the start of jury selection. The trial court took the state's interests in protecting rape victims into account in excluding the statement, but did not adequately consider the defendant's constitutional right to confrontation. The jury should have been given the opportunity to hear the excluded diary statements and some cross examination [sic], from which they could have inferred, if they chose, that the alleged victim consented to have sex with the [defendant] and/or that the alleged victim pursued charges against the [defendant] as a way of getting back at other men who previously took advantage of her. The trial court can reduce the prejudicial effect of such evidence by limiting the scope of cross-examination as to the victim's prior sexual activity and her reputation." *Id.* at ___.

CHAPTER 8

Enforcing Personal Protection Orders

8.5 Initiating Criminal Contempt Proceedings by Warrantless Arrest

B. Making a Warrantless Arrest Where the Notice Requirements Are Fulfilled

Effective October 1, 2002, 2001 PA 203 amended MCL 28.243 to require law enforcement to fingerprint those arrested for criminal contempt of court for alleged violations of a PPO.

CHAPTER 8

Enforcing Personal Protection Orders

8.9 Sentencing for Contempt

E. Court Clerk Reporting

Effective October 1, 2002, 2001 PA 204 amended MCL 769.16a to require the clerk of the court to report the disposition of criminal contempt charges for violation of a PPO to the Michigan State Police. Additionally, 2001 PA 203 amended MCL 28.242 to require the Michigan State Police to collect and file the conviction with criminal history information.

CHAPTER 9

Statutory Firearms Restrictions in Domestic Violence Cases

9.6 Restriction Upon Conviction of a Misdemeanor

A. Federal Restriction for Domestic Violence Misdemeanors

Insert the following directly after the discussion of *United States v Wegrzyn*, 106 F Supp 2d 959 (WD Mich, 2000) on the top of p 346:

Since this benchbook's publication date, the decision in *Wegrzyn* was appealed to the United States Court of Appeals for the Sixth Circuit. In *United States v Wegrzyn*, 305 F3d 593 (CA 6, 2002), the Court of Appeals affirmed the district court's decision, indicating the decision was "far from 'absurd' because, besides being mandated by applicable law, it also gives effect to the Congressional intent to allow states to have input in the definition of the parameters of the crime, and gives effect to the expressed intent of the Michigan legislature." *Id.* at 600.

CHAPTER 11

Support

11.4 Federal Information-Sharing Requirements

On October 8, 2002, the Michigan Supreme Court permanently adopted Administrative Order 2002-03, which implements 42 USC 654(26). Administrative Order 2002-07. Administrative Order 2002-03 provides:

> "The friends of the court shall adhere to the following rules in managing their files and records:
>
> > "(1) When the Family Violence Indicator is set in the statewide automated child support enforcement system for an individual in an action, that individual's address shall be considered confidential under MCR 3.218(A)(3)(f).
> >
> > "(2) Friend of the court offices shall cause a Family Violence Indicator to be set in the statewide automated child support enforcement system on all the files and records in an action involving an individual when:
> >
> > > (a) a personal protection order has been entered protecting that individual,
> > >
> > > (b) the friend of the court becomes aware of an order of any Michigan court that provides for confidentiality of the individual's address, or denies access to the individual's address,
> > >
> > > (c) an individual files a sworn statement with the office setting forth specific incidents or threats of domestic violence or child abuse, or
> > >
> > > (d) the friend of the court becomes aware that a determination has been made in another state that a disclosure risk comparable to any of the above risk indicators exists for the individual.
> >
> > "(3) When the Family Violence Indicator has been set for an individual in any action, the Family Violence Indicator shall be set in all other actions within the statewide automated child support enforcement system concerning that same individual.
> >
> > "(4) When the Family Violence Indicator has been set for a custodial parent in any action, the Family Violence Indicator shall also be set for all minors for which the

individual is a custodial parent. When the Family Violence Indicator has been set for any minor in an action, the Family Violence Indicator shall also be set for the minor's custodian.

"(5) The friend of the court office shall cause the Family Violence Indicator to be removed:

> (a) by order of the circuit court,
>
> (b) at the request of the protected party, when the protected party files a sworn statement with the office that the threats of violence or child abuse no longer exist, unless a protective order or other order of any Michigan court is in effect providing for confidentiality of an individual's address, or
>
> (c) at the request of a state that had previously determined that a disclosure risk comparable to the risks in paragraph two existed for the individual.

"(6) When the Family Violence Indicator has been removed for an individual in any action, the Family Violence Indicator that was set automatically for other persons and cases associated with that individual shall also be removed."

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Update: Friend of the Court Domestic Violence Resource Book

CHAPTER 5

Evidence in Criminal Domestic Violence Cases

5.4 Federal Information-Sharing Requirements

On October 8, 2002, the Michigan Supreme Court permanently adopted Administrative Order 2002-03, which implements 42 USC 654(26). Administrative Order 2002-07. Administrative Order 2002-03 provides:

> "The friends of the court shall adhere to the following rules in managing their files and records:
>
> > "(1) When the Family Violence Indicator is set in the statewide automated child support enforcement system for an individual in an action, that individual's address shall be considered confidential under MCR 3.218(A)(3)(f).
> >
> > "(2) Friend of the court offices shall cause a Family Violence Indicator to be set in the statewide automated child support enforcement system on all the files and records in an action involving an individual when:
> >
> > > (a) a personal protection order has been entered protecting that individual,
> > >
> > > (b) the friend of the court becomes aware of an order of any Michigan court that provides for confidentiality of the individual's address, or denies access to the individual's address,
> > >
> > > (c) an individual files a sworn statement with the office setting forth specific incidents or threats of domestic violence or child abuse, or
> > >
> > > (d) the friend of the court becomes aware that a determination has been made in another state that a

disclosure risk comparable to any of the above risk indicators exists for the individual.

"(3) When the Family Violence Indicator has been set for an individual in any action, the Family Violence Indicator shall be set in all other actions within the statewide automated child support enforcement system concerning that same individual.

"(4) When the Family Violence Indicator has been set for a custodial parent in any action, the Family Violence Indicator shall also be set for all minors for which the individual is a custodial parent. When the Family Violence Indicator has been set for any minor in an action, the Family Violence Indicator shall also be set for the minor's custodian.

"(5) The friend of the court office shall cause the Family Violence Indicator to be removed:

(a) by order of the circuit court,

(b) at the request of the protected party, when the protected party files a sworn statement with the office that the threats of violence or child abuse no longer exist, unless a protective order or other order of any Michigan court is in effect providing for confidentiality of an individual's address, or

"(c) at the request of a state that had previously determined that a disclosure risk comparable to the risks in paragraph two existed for the individual.

(6) When the Family Violence Indicator has been removed for an individual in any action, the Family Violence Indicator that was set automatically for other persons and cases associated with that individual shall also be removed."

November 2002

Update: Managing a Trial Under The Controlled Substances Act

CHAPTER 1

Major Features of the Controlled Substances Act

1.10 Major Controlled Substance Offenses

M. Violation of Michigan Constitutional Prohibition Against Excessive Fines; Effect of Forfeiture Proceeding

Insert the following case summary as the first bullet in Section 1.10(M):

F *Emmet County Prosecuting Attorney v 5118 Indian Garden Road*, ___ Mich App ___ (2002):

The claimant was convicted of possession with intent to deliver at least five but less than 45 kilograms of marijuana, contrary to MCL 333.7401(2)(d)(ii), after 17 pounds of marijuana were found in his home. After the conviction, plaintiff filed a civil forfeiture action against the claimant, arguing that the captioned property should be forfeited under MCL 333.7521 since it was used by claimant as a "container" for controlled substances and also to facilitate a drug offense. The trial court granted summary disposition to the plaintiff. On appeal, claimant argued, among other things, that the trial court erred in granting summary disposition to plaintiff because the forfeiture of his home constituted an excessive fine under the United States and Michigan constitutions.*

*On appeal, claimant only challenged the forfeiture of his real property, not personal property. *Id.* at ___ n 1.

The Court of Appeals declined to address claimant's federal constitutional issue, since the Excessive Fines Clause under the U.S. Constitution has never been held by the United States Supreme Court to apply to the states through the Fourteenth Amendment. Thus, the Court analyzed claimant's argument under the Excessive Fines Clause of Const 1963, art I, § 16. In determining whether the fine violated the Michigan Constitution's Excessive Fines Clause, the Court looked to the factors enunciated in *People v Antolovich*, 207 Mich App 714, 717 (1994), which are

as follows: (1) the due regard to the object designed to be accomplished; (2) the importance and magnitude of the public interest sought to be protected; (3) the circumstances and nature of the act for which it is imposed; (4) the preventive effect upon the commission of the particular kind of crime; (5) and the ability of the accused to pay the fine, although the mere fact of an inability to pay the fine does not render the statute unconstitutional. In applying the foregoing factors to the facts of the case, the Court concluded that the forfeiture of claimant's house was not an excessive fine under the Michigan constitution:

> "In considering the above factors from *Antolovich* . . . we conclude that the forfeiture of a home associated with drug trafficking serves as a strong deterrence measure. . . . In addition, the nature of defendant's illegal activity in the home in this case was severe, given the quantity of marijuana found. A witness testifed that the street value of the drugs seized ranged from $30,000 to $65,000, depending on how the drugs were sold, and the records found in defendant's bedroom demonstrated that he was owed an additional $20,000 from drug customers. The home was valued between $100,000 and $200,000, and [claimant's] attorney valued the home at the low end of this scale. Given the amount of drugs involved, the value of the drugs and the home, and the societal harm imposed by defendant's actions, we conclude that the forfeiture of defendant's home did not constitute an unconstitutionally excessive fine."

On other issues, the Court held that the trial court did not err in granting summary disposition to plaintiff on the basis that there was a "substantial connection" between claimant's home and the drug activity, a nexus required under MCL 333.7521(1)(f). Finally, on public policy grounds, the Court held that the homestead exemption, as contained in Const 1963, art 10, § 3, and codified in MCL 600.6023, cannot be applied to the instant case, since claimant's home was used as an instrumentality to further illegal drug trafficking.

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Update: Sexual Assault Benchbook

CHAPTER 3

Other Related Offenses

3.22 Malicious Use of Phone Service

A. Statutory Authority

Effective November 1, 2002, 2002 PA 577 amended numerous provisions of MCL 750.540e. Accordingly, the existing language in subsection (A) of the *Sexual Assault Benchbook* should be replaced with the following language:

MCL 750.540e provides:

> "(1) A person is guilty of a misdemeanor who maliciously uses any service provided by a telecommunications service provider with intent to terrorize, frighten, intimidate, threaten, harass, molest, or annoy another person, or to disturb the peace and quiet of another person by any of the following:
>
> > "(a) Threatening physical harm or damage to any person or property in the course of a conversation or message through the use of a telecommunications service or device.
> >
> > "(b) Falsely and deliberately reporting by message through the use of a telecommunications service or device that a person has been injured, has suddenly taken ill, has suffered death, or has been the victim of a crime or an accident.
> >
> > "(c) Deliberately refusing or failing to disengage a connection between a telecommunications device and another telecommunications device or between

> a telecommunications device and other equipment provided for the transmission of messages through the use of a telecommunications service or device.
>
> "(d) Using vulgar, indecent, obscene, or offensive language or suggesting any lewd or lascivious act in the course of a conversation or message through the use of a telecommunications service or device.
>
> "(e) Repeatedly initiating a telephone call and, without speaking, deliberately hanging up or breaking the telephone connection as or after the telephone call is answered.
>
> * * *
>
> "(g) Deliberately engaging or causing to engage the use of a telecommunications service or device of another person in a repetitive manner that causes interruption in telecommunications service or prevents the person from utilizing his or her telecommunications service or device."

"A communication that either originates or terminates in this state is a violation of MCL 750.540e and may be prosecuted at the place of origination or termination." MCL 750.540e(2).

See MCL 750.540c for the definitions of "telecommunications," "telecommunications service," and "telecommunications device."

B. Penalties

Effective November 1, 2002, 2002 PA 577 amended the maximum statutory fine from $500.00 to $1,000.00. MCL 750.540e(2).

CHAPTER 7

General Evidence

7.2 Rape Shield Provisions

G. Evidence of Prior Sexual Conduct Involving Defendant

Insert the following case summary as the last bullet in Section 7.2(G), after the summary of the *Johnson* case:

F *Lewis v Wilkinson*, ___ F3d ___ (CA 6, 2002):

In this federal habeas corpus case, a jury in the Ohio Court of Common Pleas convicted the defendant of rape after he sexually penetrated the victim in her dorm room at the University of Akron. The defendant and victim were friends who met during their first year of college. The defense at trial was consent. At issue on appeal was the trial judge's refusal to admit into evidence specific portions of the victim's diary under Ohio's rape shield statute, which is substantially similar to Michigan's rape shield statute under MCL 750.520j. The diary entry at issue during the trial and on appeal was as follows (the excluded statement is italicized):

> "I can't believe the trial's only a week away. I feel guilty (sort of) for trying to get Nate [the defendant] locked up, but his lack of respect for women is terrible. I remember how disrespectful he always was to all of us girls in the courtyard . . . he thinks females are a bunch of sex objects! And he's such a player! He was trying to get with Holly and me, and all the while he had a girlfriend. I think I pounced on Nate because he was the last straw. That, and because I've always seemed to need some drama in my life. Otherwise I get bored. That definitely needs to change. I'm sick of men taking advantage of me . . . *and I'm sick of myself for giving in to them. I'm not a nympho like all those guys think. I'm just not strong enough to say no to them. I'm tired of being a whore. This is where it ends*. *Id*. at ___. [Emphasis added.]

The defendant claimed that the trial judge's failure to admit the italicized statements amounted to a denial of his Sixth Amendment right to confront the witness. The Ohio Court of Appeals affirmed defendant's conviction. The Ohio Supreme Court denied leave to appeal, dismissing the appeal as not involving any substantive constitutional question, even though the Supreme Court was presented with defendant's Sixth Amendment issue. The United States District Court for the Northern District of Ohio denied

defendant's petition for habeas corpus. The U.S. Court of Appeals for the Sixth Circuit reversed the District Court's denial of habeas relief, remanding with directions to issue a conditional writ of habeas corpus. The Sixth Circuit Court of Appeals held that the trial court violated defendant's Sixth Amendment right to confront witnesses when it refused to admit the foregoing italicized statements, finding that the judge could have reduced the prejudicial effect of such evidence by limiting the scope of cross-examination as to the victim's prior sexual activity and reputation:

> "[Defendant] was denied his Sixth Amendment right to confrontation when the trial court excluded several statements from the alleged victim's diary. The statements at issue, especially when read with the diary entry in its entirety, can reasonably be said to form a particularized attack on the witness's credibility directed toward revealing possible ulterior motives, as well as implying her consent. This court recognizes the difficulty a trial judge faces in making an evidentiary decision with the urgency that surrounds the wrapping up of pretrial loose ends prior to the start of jury selection. The trial court took the state's interests in protecting rape victims into account in excluding the statement, but did not adequately consider the defendant's constitutional right to confrontation. The jury should have been given the opportunity to hear the excluded diary statements and some cross examination [sic], from which they could have inferred, if they chose, that the alleged victim consented to have sex with the [defendant] and/or that the alleged victim pursued charges against the [defendant] as a way of getting back at other men who previously took advantage of her. The trial court can reduce the prejudicial effect of such evidence by limiting the scope of cross-examination as to the victim's prior sexual activity and her reputation." *Id.* at ___.

CHAPTER 9

Post-Conviction and Sentencing Matters

9.2 Post-Conviction Bail

D. Appellate and Trial Courts Have Concurrent Jurisdiction to Decide Bail

Insert the following Note after the first full paragraph on p 445:

> **Note:** The Michigan Supreme Court has held that an application for a federal writ of habeas corpus does not constitute a criminal "appeal" under MCL 770.8, the statute permitting bail during the process of appeal, since a court's authority under MCL 770.8 is "limited to the time *during* the appellate process, and federal habeas corpus proceedings are not a continuation of that process. *People v Jones*, ___ Mich ___, ___ (2002) (emphasis in original).

CHAPTER 10

Other Remedies for Victims of Sexual Assault

10.3 Defenses to Civil Actions

A. Statutes of Limitations for Civil Actions

2. Commencement of Limitations Period and the "Discovery Rule"

Insert the following language at the end of the first partial paragraph on p 486:

> "See also *Hoekstra v Bose*, ___ Mich App ___ (2002), where the Court of Appeals held that under MCL 600.5856 the limitations period is tolled upon the proper filing and serving of a complaint and summons, even though the court may not have acquired personal jurisdiction over the defendant."